

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HERNEY BAENA-VALENCIA,

Petitioner,

MEMORANDUM & ORDER

08 CV 3687 (RJD)

-against-

UNITED STATES OF AMERICA,

Respondent.
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DEARIE, Chief Judge.

Petitioner Herney Baena-Valencia seeks a reduction in a 37 month sentence following his plea of guilty to heroin importation. An admitted, experienced courier, petitioner received favorable consideration from the government and sentencing court including safety valve credit and a plea to a lesser included offense. He renews his request for additional leniency citing again his ailing mother and teenage daughter and the fact that he cannot provide for them while in prison.

As an initial matter, the Court notes that petitioner has already been released from prison and not being a United States citizen may have already been deported, thereby rendering his petition moot. See Califano v. United States, 2005 WL 1379018 (E.D.N.Y. June 7, 2005). In any event, as part of his plea agreement with the government, petitioner waived his right to seek review of any sentence less than 63 months. See Plea Agreement between United States of America and Herney Baena-Valencia, ¶ 4 (“The defendant agrees not to file an appeal or otherwise challenge by petition pursuant to 28 U.S.C. § 2255 or any other provision the conviction or sentence in the event that the Court imposes a term of imprisonment of 63 months or below.”). This waiver was specifically addressed by Magistrate Judge Azrack at the time of

petitioner's plea, and petitioner assured Judge Azrack while under oath that he understood the stipulated limitation. See Transcript of April 11, 2007 Plea Hearing at pgs. 9-10. There is nothing before the Court that remotely calls into question his understanding of his waiver. Accordingly, in light of his knowing and voluntary waiver, and for the reasons stated in the government's letter in opposition to the petition, the relief request is denied and the petition is dismissed. See United States v. Garcia, 166 F.3d 519, 521 (2d Cir. 1999) (per curiam) (holding that a knowing and voluntary waiver of the "right to appeal a sentence within an agreed upon Guidelines range generally is enforceable").

CONCLUSION

For the reasons set forth above, the instant petition is denied. A certificate of appealability will not issue. See 28 U.S.C. § 2253. The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Brooklyn, New York
January 11, 2010

s/ Judge Raymond J. Dearie

RAYMOND J. DEARIE
United States District Judge